

Arent Fox

September 21, 2009

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Office of the Secretary, Room TW B204
Washington DC 20554

Jonathan E. Canis

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Re: WC Docket No. 09-152
In the Matter of Petition for Declaratory Ruling to the Iowa Utilities Board
and Contingent Petition for Preemption

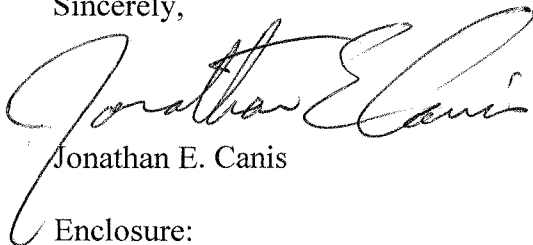
Dear Secretary Dortch:

Please accept for filing in WC Docket No. 09-152 the attached Open Letter, which is being filed as an informal comment. The letter expresses the positions of CEOs of 20 different companies, all of which are critically affected by the Commission's actions in this docketed proceeding.

The 20 signatories to this letter are represented by a variety of in-house and outside counsel. Should the Commission wish to address any of the individual signatories, please direct any inquiries to me, and I will ensure that they are directed to the appropriate party or parties.

Thank you for your attention to this matter, and please direct any inquiries to the undersigned.

Sincerely,



Jonathan E. Canis

Enclosure:

RPP/348592.1

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September 21, 2009

Re: The Commission Must Put a Stop to IXC Theft of Service and
Self-Help Refusals to Pay Access Charges

Dear Mr. Chairman and Commissioners:

We are the CEOs of 20 incumbent and competitive local exchange carriers, transport carriers, conference service companies, and other service providers. We are writing you to request action by the Commission to settle the law in an access dispute that has been enormously harmful to small local exchange carriers and other small communications companies, serving both rural and non-rural areas. This dispute is having a debilitating impact on carriers that are bringing innovative services – including wireline and wireless broadband, triple-play, and participant-paid conference calling – to rural and non-rural communities across the country.

**OPEN LETTER OF 20
TELECOM CEOs**

**Submitted in
WC Docket No. 09-152**

Specifically, we ask that the Commission take action to stop an illegal campaign of self-help refusals to pay access charges perpetrated by the largest interexchange carriers in the country against small LECs, transport providers, and other carriers and service providers across the country. As discussed below, the largest interexchange carriers in the country have engaged in widespread self-help against a growing number of carriers with whom they have disputes. This campaign, initially conducted against a relatively small number of rural LECs in 2006 and 2007, has now grown into a pandemic that is affecting dozens of carriers and service providers across the country. Moreover, at the same time the IXC's are refusing to pay lawfully tariffed charges to competing carriers, the IXC's are collecting their normal service fees from their end user customers for the same calls, resulting in a windfall to the largest carriers in the country, at the expense of competitive carriers that lack market power.

Commission inaction, and an inefficient reliance on the formal complaint process to address this issue, has resulted in more than 20 pending federal court cases, three court referrals to the Commission, and a highly flawed state regulatory proceeding, all of which demand immediate Commission guidance. We ask that the Commission issue a Declaratory Ruling that makes a definitive statement of the law regarding the application of access charges on calls to conference and chat-line operators, and to reiterate its long-standing prohibition of IXC self-help.

I. THE COMMISSION'S REGULATORY SCHEME FOR ACCESS CHARGES HAS BROKEN DOWN

Access charges have been the focus of disputes between LECs and IXC's continuously since their inception in 1984. These disputes typically involve IXC allegations that the LEC rates or traffic volumes are too high, followed by IXC "self-help" – a refusal to pay the invoiced access charges. In 2001, the Commission established a new regulatory scheme, intended to quiet these disputes: 1) it regulated CLEC access charges for the first time, requiring them to match the prevailing ILEC rate in the same service area, and 2) it then found that such rates were "conclusively deemed reasonable" and that LECs could enforce collection actions on their tariffed rates "without the impediment of a primary jurisdiction referral."¹ In so doing, the Commission guaranteed reasonable rates for IXC's and provided LECs protection against IXC self-help refusals to pay. This regulatory scheme worked well for a time, but over the last three years, a massive wave of federal court litigation has shown that the Commission's regulatory structure has broken down.

Moreover, while the initial collection actions have involved LEC and IXC disputes based on allegations of access stimulation, or "traffic pumping," IXC's are now exercising self-help against any carrier with whom they have a dispute. For example:

- IXC's have begun withholding payments to transport and transit carriers, which has generated a new series of collection actions by those carriers.

- IXCs are not simply withholding payment of access charges associated with asserted access stimulation, they are withholding payment of all payments to full-service LECs. This unlawful action extends to both intrastate and interstate access charges.
- IXCs are in some cases terminating payment to any carrier whose call volumes increase significantly – even when such traffic increases reflect the acquisition of new business and residential customers, and have nothing to do with conference, chat-line or international traffic.
- IXCs have begun to impose grossly excessive charges on resellers of their interexchange services who carry calls to certain numbers or exchanges designated by the IXCs. In most cases, these surcharges to IXC resellers are many times the highest access charges that may be applied by LECs. Recent reports indicate that these excessive surcharges have begun to result in call blocking.

Despite the fact that the Commission has long-established rules and policies prohibiting self-help – a position that has been adopted by other state regulatory commissions, and upheld by state and federal courts and the U.S. Supreme Court – the practice among the largest IXCs in the country has now become pandemic. This letter describes corrective action that the Commission should take immediately.

A. THE IXCs HAVE DISCOVERED A LOOPHOLE THAT PREVENTS LECs FROM PURSUING FEDERAL COURT COLLECTION ACTIONS

Under long-established law, LECs faced with IXC self-help must pursue collection actions in the appropriate federal district court.² Under the Commission's access regulations, this should be a straightforward process – LECs file a collection action seeking payment of the tariffed rates, and rely on the Filed Rate Doctrine (against which no defenses apply) to seek timely redress from the courts. The Commission expressly anticipated that such collection actions would proceed “without the impediment of a primary jurisdiction referral.”³

The IXCs, however, have found an easy loophole to evade the Commission's regulatory structure: They do not “officially” contest the rates, but rather simply assert, without support, that the tariffs “do not apply” to the service they have taken from the LECs and other carriers, and, while the litigation drags on, they continue to use the LECs' termination services, and other carriers' services, without paying for them. This has been sufficient to create enough confusion in the courts that they ignore the Commission's prohibition against court referrals – currently, there are three court referrals from access collection actions pending before the Commission, in which federal courts hearing collection actions have asked the Commission to resolve some or all of the issues before them.⁴

This simple artifice has now delayed access collection actions against the IXCs for as much as three years, and the delay is continuing as this Commission is asked to resolve the referrals that have been made to date. Given that there are over 20 collection

actions now pending in federal district courts across the country, it is likely that this Commission will see more referrals, causing additional delay.

B. THE FORMAL COMPLAINT PROCESS IS STACKED AGAINST THE LECs, AND SHOULD NOT BE USED TO ADDRESS REFERRALS

The Formal Complaint process, when used to address referrals from federal court collection actions, is inherently biased against LECs for several reasons:

1. Recent decisions by the Enforcement Bureau hold that the Bureau will not consider complaints against IXC self-help refusals to pay access charges

In 2004, the Commission issued its decision in *Telepacific Corp. v. Tel-American*, ruling, for the first time, that it will not even consider complaints by LECs against IXCs who engage in self-help by refusing to pay access charges.⁵ The Commission recently reiterated this finding in *Qwest v. Farmers & Merchants Tel. Co.*, holding that a Formal Complaint finding that an IXC's self help violated the Communications Act would constitute a "collection action."⁶ These rulings are wrong on their face – the Commission has ruled in Formal Complaints that self-help refusals to pay access charges violate various sections of the Communications Act at least nine times over the last three decades.⁷

As a result of this newly-adopted position by the Commission, CLECs can never use the Formal Complaint Process to seek a declaration that IXCs are violating the Communications Act by engaging in self-help refusals to pay. Yet this exact claim is the basis for every access collection action brought in federal court, and this is among the issues that the collection action courts are referring to the Commission. As a result, unless the Commission reverses the position it has recently adopted, it cannot use the Formal Complaint process to resolve this issue.

2. Counterclaims are not permitted in Formal Complaint proceedings.

The Commission's rules do not allow counterclaims in Enforcement Proceedings.⁸ This, combined with the Enforcement Bureau's recent refusal to consider complaints against IXC self-help, ensures that LECs will always be on the defensive against IXC complaints, and cannot pursue valid counter-arguments and claims.

3. Formal Complaints are by definition "Restricted Proceedings" and so prevent the parties from discussing their case with the Commission, and prevent other affected parties from participating.

Formal Complaints are deemed "Restricted Proceedings," which means two things: 1) The parties to the case are generally denied the ability to conduct *ex parte* presentations to the Commission regarding their case, and 2) LECs with substantially similar – if not identical – issues risk the establishment of adverse precedent without any ability to participate in the proceeding. This is fundamentally inconsistent with the

Chairman's stated commitment to re-establishing "open and transparent" rulemaking at the agency.

4. Because the Formal Complaint decisions are party- and fact-specific, IXC's simply argue that they are not relevant precedent to other collection actions – this gives IXC's unlimited "bites at the apple," while denying LEC's dispositive precedent to support their collection actions.

The Commission has ruled in favor of rural LECs that provide conference and chat-line services, and against AT&T and Qwest, four times over the last eight years.⁹ Nevertheless, because all four of these decisions were the result of party-specific Formal Complaints, IXC's are arguing in cases across the country that these decisions have absolutely no precedential value, and are irrelevant to the other pending collection actions.

By employing the Formal Complaint process to address the ongoing disputes between LECs and IXC's over the application of terminating access charges, the Commission has effectively given IXC's unlimited "bites at the apple." It has allowed the IXC's to keep attacking the application of the same access charges to the same services, each time asserting slightly different "facts" or raising a different legal theory. At the same time, LECs are continually on the defensive – they must respond to each new argument raised by IXC's, but cannot rely on previous FCC decisions in their favor.

The Commission's reliance on Formal Complaints has effectively denied certainty to the industry, and reliable guidance to the federal courts and state regulatory commissions. This practice eschews the established precepts of *res judicata*, *stare decisis* and the "well pleaded complaint," which have been the cornerstones of regulatory and judicial efficiency for decades.

C. COMMISSION INACTION IN THE FACE OF IXC SELF-HELP ENABLES IXC THEFT OF SERVICES AND ABUSE OF PROCESS

In the 20 federal court collection actions now pending across the country, the IXC's have pursued a strategy of "cost/price squeeze" against their LEC competitors. The IXC's started their campaign of self-help refusals to pay access charges three years ago or longer, shutting off significant sources of the LECs' operating revenues.¹⁰ This self-help also requires the LECs to incur significant legal costs in pursuing collection actions to force payment. At the same time, the IXC's have initiated complaints before the Iowa Utilities Board and other state regulatory bodies, and have filed complaints against LECs in some federal courts, thereby forcing these LECs to spend additional fees to defend against these complaints. This crude but effective strategy imposes massive litigation costs on LECs, while cutting off their operating income.

Moreover, because IXC's are adept at exploiting delays in the litigation process, they have perpetuated this "cost/price squeeze" for three years to date, and will continue to extend it out, in some cases for years to come. For example, seven cases before the

federal district courts of Iowa and New York have been stayed since February 2007, and this stay will continue until the Commission releases a final order on reconsideration in the *Farmers & Merchants* case. If and when the Commission does release that order, then these four federal court cases can begin – and likely will take a further 2-3 years to be resolved. This means the IXC's will be enabled to conduct their campaign of self-help against numerous LECs for five to six years before the LECs even have a chance to receive a final court ruling.

This Commission has issued nine Formal Complaint orders, and numerous Reports and Orders, ruling that self-help refusals to pay access charges perpetrated by the largest IXC's are unlawful and violate multiple sections of the Communications Act. These findings have been echoed in numerous federal court rulings, and rulings by state public service commissions. Nevertheless, the Commission's refusal to quiet this dispute on a national basis is now enabling the IXC's to continue this same unlawful conduct against their competitors, for long enough periods to drive them out of business.

II. THE COMMISSION SHOULD USE THE PENDING IOWA UTILITIES BOARD DECLARATORY RULING PROCEEDING TO RESOLVE THIS ISSUE ONCE AND FOR ALL

On August 20, the Commission issued a Public Notice, soliciting comments on a Petition for Declaratory Ruling and Contingent Petition for Preemption, filed by Great Lakes Communications Corp. and Superior Telephone Cooperative. That Petition has been assigned to WC Docket No. 09-152. The Petition describes an order adopted – but to date not released – by the Iowa Utilities Board following a two-year proceeding investigating allegations of “traffic pumping” and hearing Iowa LEC complaints of IXC self-help refusals to pay access charges.

The scope of the IUB hearing, and its adopted order, are very broad, and cover virtually every argument possible regarding the application of access charges to calls terminating to rural LECs. The IUB's adopted order also expressly addresses IXC self-help refusals to pay access charges. The Commission can anticipate that the scope of comments in this proceeding will be extensive.

The Commission must use this opportunity to provide guidance to the IUB, and to other state regulators and to the multiple federal district courts that are now hearing cases involving these matters. This proceeding provides the Commission with the opportunity to stop its wasteful reliance on Formal Complaints to address these issues, and to provide uniform and ubiquitous guidance to the industry, and to settle the law on this matter once and for all. To the extent that any genuinely fact-specific issues remain following the clarification of the law, the Formal Complaint process would then be the appropriate vehicle for addressing them.

III. RELIEF REQUESTED

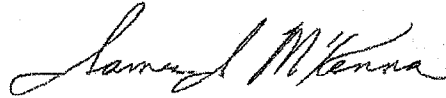
1. Stop the practice of addressing issues referred to the Commission from federal courts hearing collection actions and access charge disputes through party-specific Formal Complaints, and quiet this issue once and for all by issuing a broad Declaratory Ruling in WC Docket No. 09-152.
2. The Declaratory Ruling should address IXC self-help by reiterating the law – established in nine FCC complaint rulings, numerous reports and orders, and multiple court rulings over the last 30 years – that IXCs that engage in self-help refusals to pay access charges violate §§ 201, 203 and other provisions of the Communications Act. Reaffirm the Commission’s repeated findings that IXCs that wish to dispute LEC access charges may not engage in self help, but must “Pay and Complain” – pay the tariffed access charges, and bring their disputes against the rates to the Commission for resolution.¹¹
3. The Declaratory Ruling should address “traffic pumping” allegations by reiterating the current status of the law:
 - The Commission has never found that access stimulation, the sharing of access revenues, providing services to conference or chat-line operators, or cross-ownership between LECs and conference or chat-line companies are *per se* violations the Communications Act or the Commission’s rules.
 - The Commission has issued four orders: *Jefferson*, *Frontier*, *Beehive* and *Farmers & Merchants*, that denied arguments that LEC partnerships with conference and chat-line operators violated the Communications Act or voided the LECs’ tariffs.
 - While the Commission has a pending rulemaking proceeding considering “access stimulation” issues (WC Docket No. 07-135), and may adopt new rules and regulations regarding the matter, such rules and regulations, if adopted, will have prospective effect only.
4. On a going-forward basis, place any referral from a court regarding self-help refusals to pay access charges and “traffic pumping” allegations out for public comment, in order to determine if it implicates broad legal issues that affect multiple carriers. If so, respond to the referral with a Declaratory Ruling, and not a Formal Complaint proceeding.

We respectfully urge the Commission to act on this letter as quickly as practicable.

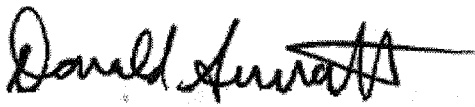
Respectfully Submitted,



Ted Shpack
Manager, Member
Audiocom, LLC



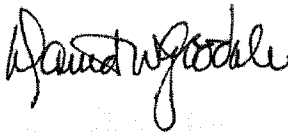
James J. McKenna
President
Aventure Communication



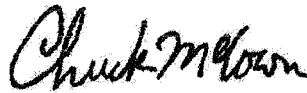
Donald Surratt
CFO
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Joy Boyd
CEO
Joy Enterprises, Inc.



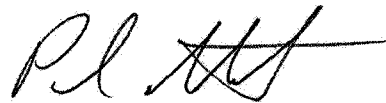
David W. Goodale
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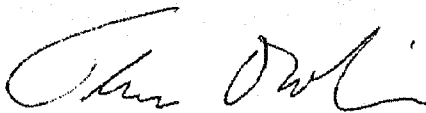
Chuck McCown
President
Beehive Telephone Company



Bret Mingo
President
Core Communications, Inc.



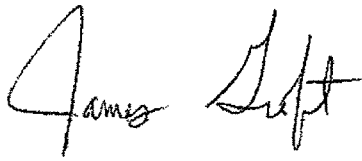
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Thomas Doolin
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Futurephone.com LLC



Ken Ford
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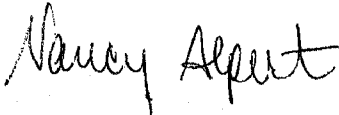
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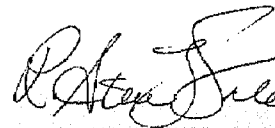
Mark Taylor
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Alan Alpert
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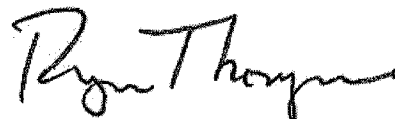
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North County Communications
Corporation



Ryan Thompson
General Manager/CEO
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Paul Cohen
CEO
Brainwave Communications



Herb Levitin
President
ChaseCom

ENDNOTES

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- ¹ *Access Charge Reform*, Seventh Report and Order, 16 FCC Rcd 9923 (2001).
- ² *E.g., U.S. Telepacific Corp. v. Tel-American of Salt Lake City, Inc.*, 19 FCC Rcd 24552 (2004).
- ³ “An IXC that refused payment of tariffed rates within the safe harbor [prescribed access rates] would be subject to suit on the tariff in the appropriate federal district court, without the impediment of a primary jurisdiction referral to the Commission to determine the reasonableness of the rate.” *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order, 16 FCC Rcd 9923, 9948 ¶ 60 (2001).
- ⁴ *All American Tel. Co., Inc. v. AT&T, Inc.*, 07 Civ. 861 (S.D.N.Y.); *Tekstar Comms., Inc. v. Sprint Commc’ns. Co. L.P.*, No. 08-cv-1130 (D. Minn). In addition, Judge Gritzner of the Federal District Court for the Southern District of Iowa has stayed seven cases pending before that Court until the Commission releases a final order on reconsideration in *Qwest Commc’ns. Corp. v. Farmers & Merchants Mut. Tel. Co.* The cases stayed before Judge Gritzner are *AT&T Corp. v. Superior Tel. Coop., et al*, Docket No. 4:07-cv-00043 (S.D. Iowa); *Qwest Commc’ns Corp. v. Superior Tel. Coop., et al*, Docket No. 4:07-cv-00078 (S.D. Iowa); *Sprint Commc’ns Co. L.P. v. Superior Tel. Coop., et al*, Docket No. 4:07-cv-00194 (S.D. Iowa); *West Liberty Tel. Co. and South Slope Coop. Tel. Co. v. MCI Communications Services, Inc.*, Docket No. 3:09-cv-0056 (S.D. Iowa); *Farmers and Merchants Mut. Tel. Co. and Dixon Tel. Co. v. MCI Communications Services, Inc.*, Docket No. 3:09-cv-0055 (S.D. Iowa); and *Interstate 35 Tel. Co. v. MCI Communications Services, Inc.*, Docket No. 4:09-cv-0213 (S.D. Iowa).
- ⁵ *Telepacific Corp., D/B/A Telepacific Communications v. Tel-America of Salt Lake City*, 19 FCC Rcd 24552 (2004).
- ⁶ *Qwest Commc’ns Corp. v. Farmers & Merchants Mutual Tel. Co.*, 22 FCC Rcd 17973, 17984 ¶ 29 (2007).
- ⁷ *APCC Services, Inc. et al. v. Network IP, LLC et al.*, 20 FCC Rcd 2073 (2005); *Bell Atlantic – Delaware v. Frontier Commc’ns Servs., Inc.* 14 FCC Rcd 16050 (1999), *aff’d* 15 FCC Rcd 7475 (2000); *MGC Commc’ns, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999), *aff’d*, 15 FCC Rcd. 308 (1999); *Communique Telecommunications, Inc. DBA Logically*, 10 FCC Rcd 10399, 10405 ¶ 36 (1995); *Business WATS, Inc., v. A.T.&T. Co.*, 7 FCC Rcd 7942 ¶ 2 (1989); *Tel-Central of Jefferson City, Missouri, Inc. v. United Tel. of Missouri, Inc.*, 4 FCC Rcd 8338, 8339 ¶ 9 (1989); *MCI Telecomms. Corp., American Tel. and Tel. Co. and the Pacific Tel. and Tel. Co.*, 62 FCC 2d 703 (1976).
- ⁸ 47 C.F.R. § 1.725.
- ⁹ *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd 16130 (2001); *AT&T Corp. v. Frontier Commcn’s of Mt. Pulaski, Inc.*, 17 FCC Rcd 4041 (2002); *AT&T v. Beehive Tel. Co.*, 17 FCC Rcd 11641 (2002); *Qwest Commc’ns Corp. v. Farmers & Merchants Mutual Tel. Co.*, 22 FCC Rcd 17973 (Oct. 2, 2007).
- ¹⁰ Previously, the largest IXCs had also resorted to call blocking as a form of illegal self-help, but the Commission issue a Declaratory Ruling addressing that activity. *Call Blocking by Carriers*, 22 FCC Rcd 11629 (2007).
- ¹¹ “The Commission previously has stated that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier’s applicable tariffed charges and regulations.” *Business WATS, Inc., v. A.T.&T. Co.*, 7 FCC Rcd 7942 ¶ 2

(1989), citing *MCI Telecommunications Corporation, American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company*, 62 FCC 2d 703 ¶ 6 (1976). See also, *National Communications Ass'n. v. A.T. & T. Co.*, No. 93 CIV. 3707, 2001 WL 99856 (S.D.N.Y. Feb. 5, 2001), citing both cases.